In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 300

ALBERT H. GRISHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion and findings of the Court of Claims (Pet. App. A. 20–35) are reported at 392 F. 2d 980.

JURISDICTION

The judgment of the Court of Claims was entered on April 19, 1968. The petition for a writ of certiorari was filed July 17, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether, in applying the doctrine of laches to a suit for back pay, the Court of Claims may consider

316-869—68

the period during which a discharged government employee was in prison pursuant to a sentence of a court-martial later held to have been without jurisdiction over his person.

2. Whether, even if the period of confinement be excluded, his delay of two years and nine months after his release before filing this suit bars the action under the laches doctrine.

3. Whether petitioner's action was barred for failure to exhaust his administrative remedies.

STATEMENT

In 1952, petitioner, a civilian employee of the Army Corps of Engineers, was temporarily assigned to a military command of the United States Army, for service in Orleans, France. On December 6, 1952, petitioner was arrested by the French authorities for murdering his wife. Shortly thereafter, the Army requested jurisdiction over petitioner and the French released him to American custody. On March 27, 1953, he was convicted of murder by a general court martial. His conviction was approved by the reviewing authorities, and the Court of Military Appeals affirmed the findings and sentence in February 1954.

In the meantime, while awaiting trial, petitioner had requested the Corps of Engineers to pay him for his annual leave and then to carry him on leave without pay until the situation was clarified. His request was honored, and he was placed on leave-without-pay status commencing February 24, 1953, when his annual leave was exhausted, "pending review of Court Martial Sentence." On February 26, 1954, after the

conviction was affirmed by the Court of Military Appeals, the Corps of Engineers mailed to petitioner a notice that he was to be separated from the service for notorious misconduct. Petitioner, however, never received this notice; he testified that he remained under the impression that he was on leave without pay until advised by an employee of the Corps of Engineers in October 1957, that he had been discharged.[1]

Later that month, relying on this Court's June 10, 1957, decision in *Reid* v. *Covert*, 354 U.S. 1, petitioner—then confined at the federal penitentiary at Lewisburg, Pennsylvania—filed a petition for a writ of habeas corpus. The lower courts denied relief but on January 18, 1960, this Court held that petitioner's court-martial had been without jurisdiction over him. *Grisham* v. *Hagan*, 361 U.S. 278. Petitioner was released from confinement on February 5, 1960.

At no time while petitioner was pursuing his habeas corpus action through the courts did he protest his discharge from the Corps of Engineers, either to the Corps of Engineers, to the Civil Service Commission, or to the courts.[2] Nor did he make any protest for nearly three years following this Court's holding that

[1] But see Ct. Cl. Finding 31(a), Pet. App. 32.

[2] In November of 1957 petitioner did apply to the Civil Service Commission for a refund of the amount credited to him in the retirement fund. In his application he indicated that his service had ended on February 28, 1954 (Ct. Cl. Finding 31(a), Pet. App. 32). From the filing of his habeas corpus petition in October 1957, petitioner has been continuously represented by counsel (Ct. Cl. Finding 29(d), Pet. App. 32). See, also, *Grisham* v. *Taylor*, 161 F. Supp. 112 (M.D. Pa.), affirmed, 261 F. 2d 204 (C.A. 3), reversed *sub nom. Grisham* v. *Hagan*, 361 U.S. 278.

his conviction was invalid. It was not until November 15, 1962, that he filed this action seeking to recover back pay for the period he was in prison.

The Commissioner of the Court of Claims held that the suit was barred by the six-year statute of limitations[3] and that, alternatively, petitioner's delay of two years and nine months in filing suit after his release from confinement constituted laches. The Court of Claims found it necessary to discuss only the laches defense and held the action barred because filed more than five years after October 1957—by which time *Reid* v. *Covert* had been decided and petitioner notified of his discharge.

ARGUMENT

Although petitioner seeks to relate this case to *United States* v. *Augenblick,* pending on writ of certiorari, No. 45, this Term, the instant case involves very different questions, presents an unusual factual situation unlikely to recur, and was correctly decided below.

1. The Court of Claims permissibly held that petitioner's suit was barred by laches because of his failure to sue until November 1962, five years after learning of his discharge. Petitioner rested his claim for back pay on the contention that under the Veterans' Preference Act and Army regulations (Pet. App. 25) he was entitled to actual notice of his place-

[3] The Commissioner held that the statute started to run on the date of discharge, February 28, 1954—and that since there was no showing of fraudulent concealment by the government, petitioner's ignorance of the claim until 1957 did not toll the statute.

ment on leave without pay and of his impending discharge, and that failure to follow these procedures vitiated the personnel action taken.[4] This ground of suit, however, was available to petitioner in 1957, after he learned of his discharge. Petitioner contends (Pet. 11–12) that he could not have recovered in 1957, since his claim for back pay would have been met by the defense that a person may not recover back pay for any period during which he was unable to work. *United States* v. *Wickersham,* 201 U.S. 390; *Everett* v. *United States,* 169 Ct. Cl. 11, 15–16 (back pay may not be recovered for period in which employee was physically disabled from working). To meet this defense, petitioner argues, he would have had to show that his inability to work was caused by imprisonment pursuant to an invalid conviction which should not be applied against him. But, he continues, the invalidity of the conviction may only be established in a habeas corpus proceeding.[5]

The government has taken the position that the Court of Claims is without jurisdiction to review the validity of court-martial convictions in military back-pay cases, and this Court has granted certiorari to

[4] Thus, the case is unlike *Augenblick*, where removal from the service was ordered by the sentence of an allegedly invalid court-martial. Here petitioner's cause of action did not directly involve the power *vel non* of the Court of Claims to review court-martial convictions; rather, petitioner sought to invoke that court's authority to determine compliance with civilian personnel procedures.

[5] As explained in note 9, p. 8, *infra*, it is our view that the invalidity of petitioner's conviction would not negate the defense that he may not recover back pay for the period he was in prison.

resolve the question.[6] As a practical matter, however, the Court of Claims in 1957 would have considered petitioner's contention that his court-martial conviction was invalid, if it were deemed relevant to his claim. Ever since its decision in *Shapiro* v. *United States,* 107 Ct. Cl. 650, 69 F. Supp. 205 (1947), the Court of Claims has asserted the power to review court-martial convictions in back-pay actions, and has entertained numerous such claims on the merits. Thus, whatever remedy petitioner claims now, it was equally available—or equally unavailable—to him in 1957. The Court of Claims acted reasonably in finding laches a bar when petitioner delayed so long before invoking the consideration of the court. The court's findings of excessive delay by petitioner and resulting prejudice to the government (Pet. App. 24–26) are justified. See, also, *Jackson* v. *United States,* 179 Ct. Cl. 29, certiorari denied, 389 U.S. 985. The fear that the government might raise a troublesome affirmative defense does not excuse a consequent delay in filing suit.[7]

2. Moreover, as the commissioner of the Court of Claims held, petitioner is chargeable with laches even

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[6] *Augenblick* v. *United States* and *Juhl* v. *United States,* 377 F. 2d 586, 383 F. 2d 1009 (Ct. Cl.), certiorari granted, 390 U.S. 1038.

[7] In challenging a defense that his incarceration precluded him from being ready, willing, and able to work, petitioner might well have argued—as this Court held—that he was not subject to the Uniform Code of Military Justice, under which he was court-martialed. In that context, the finality clause of the Code, 10 U.S.C. 876, which we argue in *Augenblick* precludes collateral review of a court-martial, may be inapplicable to a civilian not subject to the Code.

if his period of imprisonment is excluded from consideration. He waited two years and nine months after his release from confinement before bringing suit. Much shorter periods of delay have been held to warrant application of laches to back pay actions. *Arant* v. *Lane*, 249 U.S. 367 (1 year and 8 months); *Norris* v. *United States*, 257 U.S. 77 (11 months); *Grasse* v. *Snyder*, 192 F. 2d 35 (C.A.D.C.) (1 year and 4 months); cf. *Jones* v. *Summerfield*, 265 F. 2d 124 (C.A.D.C.), certiorari denied, 361 U.S. 841 (2 years and 9 months). As this Court stated in *Arant* v. *Lane*, *supra* (249 U.S. at 372):

> When a public official is unlawfully removed from office, * * * obvious considerations of public policy make it of first importance that he should promptly take the action requisite to effectively assert his rights, to the end that if his contention be justified, the Government service may be disturbed as little as possible and that two salaries shall not be paid for a single service.

3. Even if laches were not applicable, petitioner's suit would be barred by his failure to exhaust administrative remedies. As a veterans-preference eligible, petitioner was entitled to appeal his removal to the Civil Service Commission. In 1957, when he first learned of his removal, he had legal counsel (see n. 2, *supra*) and thus cannot plead ignorance of his rights.[8] It has been held repeatedly that an employee who does not pursue his appellate remedy in the Civil

[8] Civil Service Commission regulations required an appeal to be filed within 10 days of the adverse action—which occurred here on February 28, 1954. However, the regulations provided

Service Commission may not later challenge the basis for his removal. See, *e.g.*, *Hatton* v. *United States*, 173 Ct. Cl. 1187, certiorari denied, 384 U.S. 965; *Blackmar* v. *United States*, 354 F. 2d 340 (Ct. Cl.). Requiring a claimant to exhaust administrative remedies permits the government to correct errors on the administrative level, and thus to mitigate or avoid large damage claims that might otherwise be created. *United States* v. *Holpuch Co.*, 328 U.S. 234, 239. Thus, if petitioner had promptly applied to the Civil Service Commission for relief in October 1957, and the Commission had determined that the removal procedure violated the Veterans Preference Act, the Corps of Engineers could then have pursued proper procedures to avoid further accrual of a back pay claim.[9]

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for an extension, in the discretion of the Commission, "upon a showing by the employee that he was not notified of the applicable time limit and was not otherwise aware of the limit or that circumstances beyond his control prevented him from filing an appeal within the prescribed time limit." Section 22.302(d), 20 Fed. Reg. 2701 (April 23, 1955). There is no reason to believe that the Commission would have refused to waive the time limit, upon a showing that petitioner did not learn of his discharge until October 1957. Petitioner's habeas corpus action, in which he was represented by counsel, was filed on October 26, 1957, only 15 days after the date of the letter by which petitioner claims that he was first informed of his discharge.

[9] Since the Court of Claims found it unnecessary to reach the merits of petitioner's suit, we shall do no more than suggest that he would not have prevailed even if the suit were entertained. Recovery in back pay actions is limited to those periods during which the claimant would have been able to work, had he not been discharged. See *United States* v. *Wickersham*, *supra*, 201 U.S. at 399–400. And under the Back Pay Act, 5 U.S.C. 5596, an employee may recover only the pay which he

CONCLUSION

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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AUGUST 1968.

"normally would have earned during that period if the [defective] personnel action had not occurred". Here, if petitioner had not been removed, he would have continued on leave-without-pay status, as he had requested, and would in addition have been unavailable for work. His loss of pay was the consequence, not of the failure to afford him actual notice of the impending dismissal, but rather of his inability to render service during confinement. It is, of course, not the function of back pay actions to award damages for a criminal conviction that is later overturned. Congress has provided a remedy in some such cases, but petitioner cannot avail himself of it. Thus, the Court of Claims may award damages of up to $5,000 to any person whose conviction of an offense against the United States, including a court-martial (see *Roberson* v. *United States*, 129 Ct. Cl. 581, certiorari denied, 349 U.S. 954), is set aside on grounds of innocence. 28 U.S.C. 1495, 2513. Petitioner's conviction, however, was not set aside on grounds of innocence, and it seems likely that his back pay recovery would exceed $5,000. Thus his action is, in effect, an attempt to extend the scope of the "unjust conviction" statute.

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